Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

GERALD PALADINO and JAMES WRIGHT,

Petitioners,

v.

PHILADELPHIA HOUSING AUTHORITY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals violated the Seventh Amendment and federal procedural rules by not harmonizing the jury's verdicts, by excusing the losing party's failure to object contemporaneously to the verdicts, and by nullifying the verdicts in favor of petitioners without allowing a new trial?

PARTIES TO THE PROCEEDINGS

Petitioners are Mr. Gerald Paladino and Mr. James Wright. Respondent is the Philadelphia Housing Authority.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gerald Paladino and James Wright, by and through their undersigned attorneys, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1a-7a) is not reported. The order of the district court denying post-trial motions of respondent is attached hereto as App., *infra*, 8a.

JURISDICTION

The court of appeals entered its opinion and order on March 26, 2003. The court of appeals denied a petition for rehearing and rehearing en banc, with two judges abstaining, on April 25, 2003. App., *infra*, 13a-14a. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides that "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This case involves jury verdicts which were found inconsistent by the court of appeals.

Petitioners Gerald Paladino and James Wright brought employment discrimination claims against the Philadelphia Housing Authority ("PHA") and several of its

employees under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e, *et seq.*, and the Pennsylvania Human Relations Act, 43 P.S. 951, *et seq.* ("PHRA"), after PHA took adverse employment action against petitioners because of their race.

The Philadelphia Housing Authority ("PHA") manages and operates approximately 23,000 public housing units in the City of Philadelphia. A. 776.[1] Petitioner Paladino has been employed by PHA since 1981. A. 798-799. Petitioner Wright has been employed by PHA since 1988. A. 469-470.

Evidence at trial established that the following individuals played key roles in the adverse employment actions taken against petitioners:

- Charmaine Morton ("Morton"), from 1994 until 1998, was PHA's Equal Employment Opportunity Officer. A. 1067.
- Edward France ("France") was, at all relevant times, the Director of Human Resources Department for PHA and was Morton's direct supervisor. A. 1191.
- Frederick Purnell ("Purnell") was PHA's Associate Executive Director for Modernization in January 1997 (A. 1771) and, on November 1, 1997, became interim Executive Director. A. 1801.
- Neil Wortman ("Wortman") was the Interim Associate Director of the Modernization Department. A. 1743.

Morton, France and Purnell were sued in their individual and official capacities.[2]

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[1] The references throughout this Petition to "A." followed by page numbers refer to the record before the court of appeals.

[2] George Fields ("Fields") was also sued in his individual and official capacity. The district court granted judgment in favor of Fields prior to the submission of the case to the jury.

At trial, petitioners presented substantial evidence that PHA unlawfully discriminated against them. The evidence was sufficient to establish a *prima facie* case of employment discrimination and to show that PHA's reasons for its adverse employment actions against petitioners were pretextual, thus permitting the jury to conclude that PHA unlawfully discriminated against them.

The trial record was so replete with weaknesses, inconsistencies and contradictions in PHA's proffered reasons for its adverse employment actions against petitioners that the jury could rationally find that the true reason for PHA's decision was race discrimination. In addition, the evidence permitted the jury reasonably to find that PHA intentionally destroyed or failed to produce crucial documentary evidence.

The unanimous jury found that PHA unlawfully discriminated against both petitioners in violation of Title VII and the PHRA, and found in favor of the individual defendants. A. 2029-2033. The district court polled the jury, determined that the verdicts were unanimous and ordered them recorded and judgment entered in accordance with those verdicts. A. 2033-2035.

PHA did not object to the allegedly inconsistent verdicts before the jury was discharged. PHA raised the alleged inconsistency for the first time in its post-trial brief. When the trial court denied this post-trial motion, PHA appealed. The court of appeals, without the benefit of oral argument and, in a cursory opinion, reversed the district court and ordered entry of judgment as a matter of law for PHA.

In the spring of 1997 Paladino and Wright, who are Caucasian, applied for the positions of Housing Rehabilitation Supervisors. George Fields, an African American, was also permitted to apply for the position, although he

failed to submit his application by the posted deadline[3] and failed to meet the posted requirements for the job. A. 1761, 1764-1765. In August of 1997 Paladino and Wright were promoted to Housing Rehabilitation Supervisor positions.

On August 21, 1997, the same date that the letters granting the promotions were mailed to Paladino and Wright, but prior to the date that the promotions were publicly announced, Fields claimed in a memo to Purnell, who is also African American, that he had been "omitted [from promotion] for a coworker who has less qualification." A. 2062. The memo did not make any allegation of race discrimination.

Charmaine Morton, PHA's Equal Employment Opportunity Officer, who is African American, met with Fields sometime between August 21 and August 25, 1997. A. 1090. At the conclusion of this meeting, Fields gave her a revised version of the memorandum which was also dated August 21, 1997. A. 2062-2063. This second version claimed, for the first time, that Fields had been denied promotion because of racial discrimination.[4] A. 2063.

Based upon Fields' unsubstantiated complaint of race discrimination, Purnell ordered France to place Paladino

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[3] PHA allowed Fields to apply for the promotion after the deadline had passed after Purnell's office provided Fields with a slip which falsely stated that Fields had been out of work because of an injury during the time of the first job notice posting. A. 536, 592, 598-602, 1417-1418, 1811, 2047.

PHA also justified Fields' late application with a document, authored by France's subordinate, Robert Kosinuk ("Kosinuk"), on April 21, 1997 which stated that the original deadline had been extended to allow two other candidates, in addition to Fields, to apply for the posted positions. A. 2177. Testimony at trial established that the statements in that document were categorically untrue. A. 1627-1629.

[4] Evidence at trial permitted the jury to infer that the second version of the memo, which included a claim of race discrimination, was written only after consulting with either Purnell (A. 1457) or with Morton (A. 1460-1461) or with both.

and Wright's promotions on hold. A. 2069, 1803-1805, 1223-1224.

Morton then began what PHA termed an "investigation" into Fields' complaints. A. 1104-1105.

Prior to issuing her final report, Morton failed to interview candidates other than Fields and the interviews that were done were grossly inadequate.[5] Additionally, Morton interviewed only one of the interview panelists, Tony Brown, an African American. A. 1170-1171, 1241-1242. Morton also failed to review crucial documents relating to the promotion process.[6]

Evidence at trial, including testimony by individual defendants and other PHA employees, also demonstrated that Morton summarily disregarded information gleaned from interviewees which did not support Fields' claim of

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[5] Wright was not interviewed by Morton before she issued her investigation report (A. 567, 1146). DiGravio, who was interviewed by Morton after Morton's investigation had ended, was asked only one question, whether he considered anything in the first interview process to have been "prejudice or racial . . . " DiGravio said *no* and Morton ended the interview. A. 1003, A. 1147.

At trial Morton testified that she had spoken to at least three applicants other than Fields, regarding the selection process. However, Morton could not remember the names of the applicants and could not remember what they said to her. Morton further testified that she had notes of those discussions. A. 1112, 2059. None of those notes were ever produced by PHA. Morton's trial testimony about interviewing these applicants was contradicted by her deposition testimony, which was read to the jury at trial, where she said she had not interviewed them. A. 1113-1114.

[6] Morton testified that Purnell never showed her any documents concerning the selection process and denied being told by Purnell that he possessed such documents. A. 1142. In contrast, Purnell testified that at Morton's request he gave her access to all of the documents in his file and had she wanted, she was free to make copies. A. 1189-1190.

race discrimination[7] and that Morton fabricated several "findings" in her final investigation report.[8]

The final report issued by Morton concluded that the promotion process was uncontrolled and biased. A. 2058, 2060.

Thereafter, Purnell voided Paladino and Wright's promotions based on Morton's investigation report. A. 1227, 2069. Despite the fact that France had instructed Morton to collect documents during her investigation in order to create an "audit trail," France chose not to review any of the documents collected by Morton. A. 1200, 1308, 1363, 1364.

During the litigation of this matter, PHA failed to produce the notes and other materials Morton collected during her investigation. A. 1069. PHA also failed to offer any evidence to account for the missing documents.[9]

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[7] Fields claimed that he had not been notified of the scheduling of his interview. Marra testified that he provided Morton with a copy of the documents he had related to the promotion process, including the notice that had been sent to Fields notifying him of his interview. A. 625, 627, 729, 2046. Morton admitted reviewing Marra's file, but denied ever seeing the Fields' notice letter. A. 1126, 1183, 2059. Additionally, despite the fact that Marra and Marra's assistant, Brennan, told Morton that a notice letter had been mailed to Fields, Morton disregarded those statements in her final report. A. 1130-1134.

[8] According to Morton's final report, Purnell told her that several African American employees in the Inspections Division had complained to him about not seeing the first Job Notice posting (A. 2059). Purnell denied this, stating that he did not recall anyone complaining about not seeing the posting. A. 1824-1826.

[9] Morton testified that these documents were put into a file that she last saw in a locked cabinet in her office in Human Resources. A. 1072. Morton claimed that on her last day as the EEO officer she gave her key to the locked cabinet to France who was then the only person with access to that cabinet. A. 1072-1073. France denied having a key (A. 1195) and denied any knowledge of the location of Morton's files. A. 1196-1197.

France shifted responsibility for the missing documents to PHA's Director of Security, who he claimed may have had a master key to all

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On November 14, 1997, France wrote a letter to all inspection division employees notifying them that the entire "initial effort" had been canceled. A. 1309-1311. This letter was closely followed by another posting for the supervisor positions. At that time France and Wortman took control of the promotion process (the "France-Wortman process").

Paladino, Wright and Fields continued to compete for the promotions under the France-Wortman process.

Under the France-Wortman process, any person, regardless of qualifications or experience, could apply (A. 1310, 2044) and all applicants were interviewed in December 1997. Wortman and France prepared the questions and devised the procedure to be followed in the second selection process. A. 1724, 1312-1315. The panelists used these questions during the December 1997 interviews from which the final five candidates were ultimately selected. A. 1744-1752.

The testimony of the individual defendants and other PHA employees was contradictory regarding the manner in which the interviews were conducted and which panelists were involved in the interview process.[10]

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of the offices and file cabinets located in the Department. A. 1196. France never identified the Director of Security and this person was not called by PHA to explain any contact with the missing records. Instead, PHA offered the testimony of its former in-house counsel, Marie Fritzinger ("Fritzinger"), who testified that she looked for documents related to this case. Fritzinger testified that her search was begun after this lawsuit had been filed (A. 1518, 1523) and that she limited her search to two PHA locations. A. 1515-1516. Fritizinger testified that she could not find the documents. A. 1515-1516.

[10] France, who was present for the December interviews, insisted that he alone questioned the candidates by reading the predetermined France-Wortman questions. A. 1243. France was contradicted by interviewees Jose Nunes and DiGravio, who testified that *all* the panelists asked questions. A. 1007-1008, 1491. Each panelist scored each candidate and then gave the score sheets to France who, alone, determined the final five candidates. A. 1300-1301, 1356. France's testimony was directly contradicted by his sworn answers to interrogatories where he stated that "[a]lthough [he] facilitated the process, he

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Uncontroverted evidence at trial showed that during a meeting with the panelists prior to the December 1997 interviews, France warned the panelists that the entire matter could end up in litigation and urged them to be very careful because a charge of race discrimination had already been filed necessitating a new interview process. A. 1244-1245. Among the panelists attending this meeting was Brown, who, France knew, also had served as a panelist during the first promotion process and had been the only panelist interviewed by Morton during her "investigation" of Fields' complaint. A. 1242-1245.

The top five candidates in the France-Wortman process advanced to the final round held in January 1998. A. 1729. Virtually none of the documents relevant to how the final five candidates were selected were produced by PHA. PHA did produce a chart prepared by France after the December 1997 interviews. A. 2077. In this document, France used a complex statistical analysis ("France's statistical analysis") to determine how to rank the twenty-two candidates in the December 1997 interview process. A. 1252-1254. France ranked Wright ninth, Paladino seventh and Fields fifth. A. 2077. Thus, France cleared the way for Fields to proceed to the final selection process. However, the raw data allegedly underlying France's statistical analysis was never produced by PHA.

As PHA has conceded, Wortman was the PHA official who selected Fields[11] for promotion out of the five finalists. Wortman alone testified to the score assigned to each of

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was not involved in selection, grading or ranking." A. 1275-1278, 2080-2081, 2084.

[11] PHA's Third Circuit Brief of Appellant at 14.

Wortman made this decision despite the fact that Fields received unacceptable scores in category 3 "Understanding of what is necessary to be a good supervisor." A. 1757, 1761-1765. Wortman testified that he did not consider it important that Fields was unacceptable as a supervisor even though the promotion was for a supervisor's position. A. 1764-1765.

the candidates; PHA failed to produce documentary support for his testimony.[12] A. 1736.

Evidence at trial also demonstrated that, prior to the final interviews, France wrote a memo stating that George Fields, Jose Nunes and Albert DiGravio "Gets (sic) the job". A. 2076, 1342-1344.

As a result of the France-Wortman process, George Fields, Jose Nunes and Albert DiGravio were offered the Housing Rehabilitation Supervisor jobs. A. 1737, 1739-1740.

All of the documents relating to the France-Wortman process were kept in the same file by PHA. Although PHA was able to produce France's statistical analysis, PHA did not produce the documents from the December 1997 interviews (underlying France's statistical analysis), the score sheets ranking each candidate (underlying Wortman's rough matrix) or Wortman's rough matrix. Neither Wortman nor any other PHA witness could explain why France's statistical analysis and Wortman's rough matrix were available while other critical documents from the same file had disappeared.[13] A. 1766-1768.

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[12] Wortman testified that no candidate was given a score until all five had been interviewed. A. 1759. This testimony was directly contradicted by DiGravio who testified that he was offered the job immediately at the conclusion of his interview. A. 1009.

Wortman further claimed that he used the individual score sheets to prepare a "rough matrix" ranking each candidate and that this matrix was the basis for a more formal matrix ranking each candidate. A. 1759-1760, 2149-2150. Wortman placed the rough matrix, which reflected the candidates' actual scores, into the file that he maintained on the second process. A. 1759. The rough matrix was never produced by PHA. Indeed, other than Wortman's testimony, PHA failed to present any evidence at trial concerning the score actually earned or assigned to the finalists.

[13] France did not know where to find most of the documents related to the second interview and selection process, including the interview forms reflecting the basis for the raw scores which he assigned to the candidates. France claimed he turned all these documents over to his successor, Carl Marinelli ("Marinelli") and told him that he was

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These documents were not the only critical materials to disappear. Morton's investigation file could not be located (A. 1072, 1086-1087, 1113-1118, 1121, 1136-1137, 1176, 1177) and Purnell did not know the location of his file for the Inspections Division. A. 1786-1787, 1844. Once on notice in November of 1997 that Paladino and Wright were asserting potential claims of race discrimination against PHA for rescinding their promotions,[14] PHA had a federally mandated duty to preserve all relevant documents. Instead these documents disappeared contrary to a specific written PHA policy requiring that documents related to any claim against it be preserved.[15] A. 783, 784, 2061.

PHA also failed to produce the documents kept in Marra's file related to the first promotion process. In mid-1998 Marra had been ordered by PHA to pack these documents for storage. A. 713-714, 741-742. PHA did not present any evidence relating to the location of these documents or regarding any search they may have done to

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convinced litigation would ensue because of the promotion decisions. France told Marinelli these documents "were records he [Marinelli] needed for this particular situation" and that it was written PHA policy to preserve such records. A. 1249-1252. PHA did not call Marinelli to testify about the location of the documents allegedly given to him by France.

Wortman, the Acting Director of the Modernization Department following Purnell's promotion to Acting Interim Executive Director (A. 1721), and the official responsible for the decision to promote Fields (A. 1261, 1265, 1757), was unable to account for the location of most of the critical documents which he claimed were generated by him in connection with the final interview process. A. 1745-1746, 1759.

[14] In November of 1997 Paladino and Wright each contacted France to find out why his promotion was rescinded. A. 509-510, 1273, 1279, 2085. Paladino then sent a written complaint to France on January 15, 1998. A. 1269, 2070.

[15] The receipt of millions of dollars of federal funds depended on PHA's promulgation of and compliance with this HUD document retention policy. A. 779, 783-784.

find these documents. Marra testified that he was never given an opportunity by PHA to look for those materials after those documents were sent to storage. A. 742-743.

The unanimous jury in this case found that PHA unlawfully discriminated against both petitioners in violation of Title VII and the PHRA (A. 2029-2030), and found against both petitioners and in favor of the individual defendants. A. 2030-2033. Following this reading of the verdict, the district court polled the jury, determined the verdicts were unanimous, ordered them recorded, and entered judgment. A. 2033-2035. PHA raised no objection to the alleged inconsistency of the verdicts following the reading of the verdicts, the polling of the jury, or following the entry of judgment in favor of petitioners and against PHA and in favor of the individual defendants and against petitioners. A. 2029-2035.

Since no objection was raised, the district court dismissed the jurors. A. 2035-2036.

PHA's post-trial motions for a new trial or judgment notwithstanding the verdict were denied. On appeal, the court of appeals reversed the district court and ordered that judgment be entered in favor of PHA.

Petitioners raised the following issues before the district court[16] and the court of appeals[17]: 1) the constitutionally required duty to harmonize apparently inconsistent jury verdicts and 2) the proper remedy in the event of inconsistent verdicts. Petitioners reiterated this Seventh Amendment duty to the court of appeals in their petition for rehearing.[18]

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[16] *See* Plaintiffs' Joint Memorandum of Law in Opposition to Defendant PHA's Post-Trial Motion at 54-65 (district court proceeding).

[17] *See* Brief of Appellees at 30-35 (proceedings on appeal).

[18] *See* Petition for Rehearing and Rehearing En Banc at 4-11 (proceedings on appeal).

REASONS FOR GRANTING THE PETITION

Sometimes a seemingly straightforward procedural issue so confounds the lower federal courts that this Court's intervention is required.[19] This case presents just such a procedural puzzle. The case offers this Court the opportunity to settle crucially important disagreements among the lower courts over a federal court's Seventh Amendment obligation to harmonize a jury's verdicts, the procedures required for a losing party to preserve jury verdict objections, and the available remedy for a trial court to dispose of allegedly inconsistent verdicts.

In struggling with these jury verdict issues, circuit courts have gone on record with positions conflicting with the United States Court of Appeals for the Third Circuit in this case. Moreover, the court of appeals' position here deviated from this Court's opinions and compromised the protections of the Constitution's Seventh Amendment. The Third Circuit disregarded the role of the jury as fact-finder when it made a judicial determination to ignore the jury's verdict and order entry of judgment for PHA.

In the area of employment discrimination, scholars have empirically documented an overwhelming trend in federal courts of appeal to favor employment discrimination defendants.[20] Whether or not the errors by the court of appeals below are part of this tide of appellate reversals, the problems of how to handle the complex issues surrounding jury verdicts are recurrent and extend beyond the employment discrimination context. The issues presented herein confront lower federal courts on a daily basis, fundamentally impact the delivery of justice in the

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[19] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), is an example. There this Court not only clarified the standard governing summary judgment in the specific factual context of asbestos litigation, but also provided broad reaching guidance to district courts in all litigation.

[20] *See* Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*; 2002 U. Ill. L. Rev. 947, 957-958 (2002).

federal judicial system, and therefore well deserve this Court's wisdom and attention.

I. The court of appeals ignored its constitutional duty as well as the precedents of this Court which require that federal courts attempt to harmonize seemingly inconsistent verdicts.

A. The Seventh Amendment to the United States Constitution and this Court's jurisprudence mandate that federal courts attempt to harmonize seemingly inconsistent jury verdicts if there is any view of the case which reconciles the verdicts.

The Seventh Amendment to the United States Constitution mandates that federal courts attempt to harmonize seemingly inconsistent jury verdicts if there is any view of the case which reconciles the verdicts. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-359 (1962) (citations omitted). Because courts are required to defer to jury findings, where there is a view of the case which reconciles a jury's seemingly inconsistent verdicts, the court must take that view of the case. *Atlantic*, 369 U.S. at 363.

In attempting to harmonize verdicts, the verdicts must be viewed in light of the jury instructions given. "The jury verdict cannot be reconciled by assuming that the jury failed to follow the court's instruction in arriving at its verdict. To the contrary, we must assume that the jury understood and followed the court's instruction." *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 105 (3rd Cir. 1993) (citations omitted); *see also, Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 604-605 (1985).

In the present case, the court of appeals utterly disregarded its constitutional duty to harmonize the jury verdicts. Rather than consider the various factual and legal explanations which would harmonize the verdicts

(and apparently ignoring the language of the jury instruction allowing the jury to find PHA liable based on the acts of *any* agent or agents, not merely the named defendants), the court, *sub silentio,* re-weighed the evidence and decided that it was in agreement with the verdicts finding no liability rather than those which found liability.[21]

This type of review is forbidden by the Seventh Amendment and precedent of this Court. Indeed, this Court has made clear that an appellate "court must draw all reasonable inferences in favor of the nonmoving party, and ***it may not make credibility determinations or weigh the evidence.***" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000) (citations omitted) (emphasis added). The court of appeals below did not apply the approach outlined in *Reeves*.

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[21] In reaching its decision, the court of appeals relied on this Court's per curiam opinion in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (Stevens, J. dissenting). However, *Heller* did not involve inconsistent verdicts. Rather, in *Heller*, the district court had bifurcated the trial against the individual defendant from the trial against the city and the police department. Once the jury found no liability on the part of the individual officer, the district court dismissed the action against the city and department. Because the danger of invalidating a jury's verdict and thereby infringing on Seventh Amendment rights was wholly absent in *Heller*, the court of appeals' reliance on that decision highlights its misapprehension of its duty in considering these purportedly conflicting verdicts.

Additionally, in *Heller* this Court set aside the finding of liability against the city because of a finding that no constitutional injury had been inflicted. Because there was no constitutional injury, there could be no finding of liability against any defendant, whether it was the city or an individual. In the present case, by contrast, the jury found that petitioners had been the victims of race discrimination.

The Third Circuit's misinterpretation of *Heller* could yield significant mischief. Review of this case would provide this Court with an opportunity to explain the proper scope of *Heller.*

B. Multiple interpretations of the record evidence exist which would harmonize the verdicts.

Drawing all reasonable inferences in favor of petitioners, as verdict winners, there are multiple harmonizing interpretations of this case which support the jury's finding of discrimination against PHA: 1) the jury may have found that other, non-party, employees intentionally discriminated against petitioners; 2) the jury may have applied the adverse inference against PHA and found that PHA's failure to produce documents indicated that it intentionally discriminated against petitioners; 3) the jury may have found that the combined actions of the individual defendants and/or non-party PHA employees established PHA's liability.

Faced with challenges to seemingly inconsistent jury verdicts in comparable cases, the courts of appeals in the Eighth, Tenth and Eleventh Circuits have followed this Court's Seventh Amendment jurisprudence and have harmonized those verdicts.[22] Under the decisions of these courts of appeals, any one of the interpretations set forth by petitioners would have been sufficient to harmonize the jury verdicts in this case. The Third Circuit, however, pursued a conflicting course.

1. The jury may have found that non-party employees intentionally discriminated against petitioners.

As petitioners learned during the course of litigation and as the evidence presented at trial in this matter demonstrated, there were numerous employees of PHA

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[22] *See Speer v. City of Wynne, Arkansas*, 276 F.3d 980 (8th Cir. 2002); *Polacco v. Curators of the Univ. of Mo.*, 37 F.3d 366 (8th Cir. 1994); *Garcia v. Salt Lake* County, 768 F.2d 303 (10th Cir. 1985); *Lincoln v. Board of Regents of Univ. Sys.*, 697 F.2d 928 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983), all of which are discussed more fully, *infra*.

involved in the process of rescinding petitioners' promotions and in the process of ultimately denying promotions to petitioners. Said PHA employees included employees other than the individually named defendants.

A finding of liability against an employer under Title VII is permissible even though the individually named agents of the employer are absolved of personal liability "when there was evidence of discrimination by agents who were not individual defendants . . . " *Polacco v. Curators of the Univ. of Mo.*, 37 F.3d 366, 369 (8th Cir. 1994) (citations omitted); *Lincoln v. Board of Regents of Univ. Sys.*, 697 F.2d 928, 934-936 (11th Cir. 1983), *cert. denied*, 464 U.S. 826 (1983). Here, the jury was charged without objection by PHA that it could find in favor of petitioners and against PHA if *any* employee or officer of PHA, not just the individual defendants, intentionally discriminated against them.

The verdicts in this case can be harmonized by viewing the evidence presented at trial in light of the instructions given at trial which charged that the jury could find in favor of petitioners and against PHA if any employee or officer of PHA intentionally discriminated against petitioners. In the present case the jury could have found that an employee or officer of PHA other than the individually named defendants intentionally discriminated against petitioners. The jury could have found, for instance, that there existed sufficient evidence that Wortman, the official who was ultimately responsible for the decision to promote Fields to Housing Rehabilitation Supervisor, intentionally discriminated against petitioners to hold PHA liable. A. 1757-1758.

2. The jury may have applied the adverse inference against PHA and found that PHA's failure to produce documents indicated that one or more of its employees intentionally discriminated against petitioners.

The jury could have found that there was sufficient evidence that at least one of the individual defendants or another non-party PHA employee intentionally discriminated against petitioners, but, because PHA failed to produce documents vital to such a determination, the jury could not determine which individual defendant(s) had done so.

An adverse inference may be applied against a party who has possession or control of evidence but who fails to produce such evidence. The district court instructed the jury regarding adverse inference and instructed the jury that, if they determined that such an adverse inference was supported by the evidence, they could find, but were not required to find, that the evidence would have been unfavorable to the party against whom the adverse inference was found to apply. A. 1985-1986. The district court further instructed the jury that an adverse inference may only be applied against a party who fails to produce evidence which is under that party's control and which is reasonably available to that party. A. 1985-1986.

In the instant case the individual defendants did not have possession or control of the documentary evidence which was crucial to the determination of which, if any, of the individual defendants discriminated against petitioners.[23]

If the jury followed the district court's instructions regarding adverse inference, an assumption which must be made, *Aspen Skiing Co.*, 472 U.S. at 604-605; *Loughman*, 6 F.3d at 105 (citations omitted), the jury could have

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[23] Frederick Purnell left PHA in June of 1999. A. 1771. Edward France left PHA in September of 1998. A. 1191. Charmaine Morton was transferred to another department at PHA in August of 1998. A. 1072.

found that the adverse inference did not apply to the individual defendants because they did not have personal possession or control of the documents. Consequently, because the jury could not be sure which individual defendant(s) the missing documents would have implicated, the jury could have properly found insufficient evidence to hold any of them individually liable. However, the jury could have found that the adverse inference *did* apply to PHA, the only defendant in the case which, at all relevant times, had possession and control of the documents. Because PHA was liable for intentional discrimination by any of the individual defendants, the jury could reasonably have found that the missing documents would have established the intentional discrimination by one or more of the individual defendants, therefore establishing PHA's liability.

3. The jury may have found that the collective actions of the named individual defendants and non-party PHA employees sufficiently established PHA's liability.

Alternatively, the jury could have found that, while there was insufficient evidence to find that any one of the individual defendants intentionally discriminated against petitioners, their combined actions (or the combined actions of the individual defendants and non-party PHA employees) were sufficient to find that PHA intentionally discriminated against petitioners. Such a finding would support a finding of liability on the part of PHA. *See Speer v. City of Wynne, Arkansas*, 276 F.3d 980, 986 (8th Cir. 2002) (citations omitted); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985).

The verdicts rendered in favor of the individual defendants did not exonerate the individual defendants. Rather, the verdicts reflected the jury's determination that there was insufficient evidence to find any one of the individual defendants liable. Arguably, an appellate court would not be able to harmonize the verdicts if the court was required to determine PHA's liability by looking at the

record evidence of each individual defendant's actions and/or decisions in a vacuum. However, neither the circuit court nor this Court is so bound. The circuit court was required to look at the record evidence of all actions and decisions of the individual defendants as actions and decisions of PHA. The circuit court was required, therefore, to view the jury's verdict in favor of petitioners and against PHA based on the combination of these actions and/or decisions.[24]

The jury could have found that each named individual defendant's actions or decisions constituted discrete acts that, when viewed in combination, established PHA's discrimination against the petitioners. The jury could have found that each named individual defendant contributed through his or her conduct and/or decision-making to discriminate against petitioners. Therefore, since it was undisputed that the conduct of all of the named defendants could be attributed to PHA, there was sufficient evidence to establish PHA's liability.

The court of appeals' determination that such a finding is not permissible to establish PHA's liability results in employers being allowed to insulate themselves from liability by merely delegating discrete discriminatory tasks or decisions to various agents or employees, no one of whom does "enough" to establish his or her individual liability for intentional race discrimination. Clearly, this contravenes the protections against race discrimination provided by Title VII.

In their brief before the court of appeals and in their Petition for Rehearing and Rehearing En Banc, petitioners provided the court of appeals with several rational harmonizing interpretations for the jury verdicts in favor of

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[24] Petitioners have found no case holding that a jury (or an appellate court when attempting to harmonize seemingly inconsistent verdicts on appeal) may not look at the combined actions of individual defendants in whose favor verdicts have been rendered to determine an employer's liability.

petitioners. Each of these interpretations is supported by Seventh Amendment case law and encouraged in employment discrimination cases under this Court's analysis of a plaintiff's burden of proof in *Reeves, supra.*

Perhaps the court of appeals would not have made the same determinations that the jury did if it had been sitting as the finder of fact. That, however, is not the relevant question. Rather, the court of appeals was constitutionally required to attempt to reconcile the verdicts. As there are several harmonizing constructions of the verdicts, the court of appeals ignored binding precedent and failed to perform its constitutional duty to harmonize the verdicts.

II. Guidance is required from this Court to clarify the proper remedy in the face of inconsistent general verdicts.

The Federal Rules of Civil Procedure do not address the procedure to be followed by district and circuit courts in the face of inconsistent general verdicts.[25] Therefore, a court searching the Rules for an appropriate reaction to inconsistent multiple general verdicts will find only silence. This is a particularly unenviable situation, for without interrogatories, there is no way to discern the true intention of the jury. Moreover, without specific guidance from the Rules, there is no specific authority on the proper remedial course of action.

Circuit and district courts, left without any clear mandate for remedial action in the face of inconsistent general verdicts, have cobbled together a body of decisions heavily reliant upon the facts of individual cases, and frequently based upon different jurisprudential underpinnings. The

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[25] Federal Rule of Civil Procedure 49 addresses issues relating to inconsistent jury verdicts. However, Rule 49 deals only with special jury verdicts, Fed. R. Civ. P. 49(a), and general verdicts accompanied by interrogatories, Fed. R. Civ. P. 49(b).

result has been inconsistency and confusion, both between and among the circuits.

The First Circuit is an example of a jurisdiction that established a principle upon which to resolve general verdict inconsistency, only to see that principle undermined by later, highly fact-sensitive decisions. In *Merchant v. Ruhle*, 740 F.2d 86 (1st Cir. 1984), the First Circuit Court attempted to reconcile inconsistent general verdicts but was unable to do so. The court held that inconsistent general verdicts should be allowed to stand. *Merchant* based its holding on the tradition of allowing inconsistency in criminal law verdicts, and the general right of juries to take idiosyncratic positions.

However, in *DeFeliciano v. DeJesus*, 873 F.2d 447 (1st Cir. 1989), *cert. denied*, 493 U.S. 850 (1989), the First Circuit Court seemed to undermine the fairly straightforward rule established by *Merchant*. As in *Merchant*, the *DeFeliciano* Court attempted to reconcile seemingly inconsistent general verdicts. After determining that the verdicts could not be reconciled, the Court held that, in the face of the failure of either party to request a new trial or ask for resubmission to the jury, judgment on the record was an appropriate remedy.

Not long after *DeFeliciano*, the First Circuit continued to qualify the *Merchant* rule when it held that, where general verdicts are inconsistent with one another, a new trial is the proper remedy. *Cool Light Company, Inc. v. GTE Products Corp.*, 973 F.2d 31 (1st Cir. 1992), *cert. denied*, 507 U.S. 973 (1993).

The First Circuit, therefore, has enunciated three distinct approaches to the issue of remedying inconsistency: allow the verdict to stand, order judgment on the record or order a new trial.

In *Malm v. United States Lines Co.*, 378 F.2d 941 (2d Cir. 1967), the Second Circuit affirmed the district court's denial of a motion for a directed verdict or for a new trial. The Second Circuit based its affirmance on the district court's opinion, reported at 269 F.Supp. 731 (S.D.N.Y. 1967),

which recognized the jury's right to render inconsistent jury verdicts upon different counts or claims. *Id.* at 731-732.

The Third Circuit, in *Mosley v. Wilson*, 102 F.3d 85 (3d Cir. 1996), has also addressed the issue of how best to remedy inconsistent general civil verdicts. Relying upon Justice Stevens' dissent in *City of Los Angeles v. Heller*, *supra*, 804-806, the *Mosley* court determined that courts should first attempt to harmonize inconsistent general civil verdicts. If that proves impossible, *Mosley* concludes that a new trial is the appropriate remedy, but never any order that allows some, but not all, of the verdicts to stand. *Mosley*, 102 F.3d at 91. It is noteworthy that the Third Circuit's ruling in the instant case is utterly at odds with *Mosley*.

The Fifth Circuit, in *Wood v. Holiday Inns, Inc.*, 508 F.2d 167 (5th Cir. 1975), determined that the correct remedy for inconsistent verdicts is a new trial. However, unlike the Third Circuit in *Mosley*, the *Wood* court did not emphasize the need to make a concerted effort to harmonize the verdicts prior to ordering a new trial. Instead, *Wood* asserts that "Where verdicts in the same case are inconsistent on their faces indicating that the jury was confused, a new trial is certainly appropriate and may even be required." *Wood*, 508 F.2d at 175. Therefore, the Fifth Circuit has outlined an approach different from that of the First or Third Circuits, where the emphasis is not on harmonization, but instead encourages a new trial without more than a finding of facial inconsistency.

The Sixth Circuit, in *Hopkins v. Coen*, 431 F.2d 1055 (6th Cir. 1970), also agrees that a new trial is the appropriate remedy for inconsistent general civil verdicts.

The Seventh Circuit, in *Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986), specifically rejected the First Circuit's *Merchant* reasoning, stating that "*Merchant* assumes that the rule in criminal cases should apply in civil cases

too; we think not," and explaining that, in its view, the tradition of allowing inconsistency in criminal verdicts is tied directly to the inability to review verdicts in favor of the defense, due to double jeopardy. *Id.* at 677. Therefore, reasoned the *Will* court, the appropriate remedy for inconsistent verdicts that have not been resubmitted to the jury is simply to order a new trial. *Id.* Interestingly, however, the *Will* court allowed the inconsistent verdicts to stand, because the inconsistency was with regard to multiple, identically-situated plaintiffs, only the losers of whom had requested new trials. Therefore, the Seventh Circuit declared that "[t]he rule that verdicts should be consistent does not tilt the scales in favor of plaintiffs, and they are not entitled to a remedy that locks in their gains while they try for more." *Id.* at 678. Thus, the Seventh Circuit in *Will* seems to have set out a rather complicated rule, which asserts that inconsistency in civil verdicts need not be tolerated, regardless of the criminal law, but that also prefers inconsistency with regard to treatment of plaintiffs over an unfair windfall.

The Eighth Circuit, in *Williams v. KETV Television, Inc.*, 26 F.3d 1439 (8th Cir. 1994), determined that an appropriate procedure in the event of an inconsistent verdict is resubmission to the jury. The *Williams* court stressed the importance of reconciling verdicts where possible. However, *Williams* does not provide a remedy where district courts have failed to attempt to reconcile the verdicts and the reviewing court cannot do so.

The Ninth Circuit recently enunciated that jurisdiction's remedy for inconsistent general verdicts. In *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), the circuit court determined that, under the prevailing law of the Ninth Circuit, it could *not* order a new trial to remedy inconsistency in multiple general verdicts. Noted *Zhang*, "We have found no Supreme Court or Ninth Circuit cases in which an appellate court has directed the trial court to grant a new trial due to inconsistencies between general verdicts, and Ninth Circuit precedent dictates that we cannot do so. . . . We are confident that this rule is historically sound and remains the majority

rule." *Id.* at 1035. The Ninth Circuit in *Zhang* held that no attempt to reconcile inconsistent verdicts is necessary, and the only available remedy is to allow the inconsistent verdicts to stand.

As illustrated in *Moss v. City of Colorado Springs*, 871 F.2d 112 (10th Cir. 1989), the Tenth Circuit requires an attempt to harmonize seemingly inconsistent jury verdicts, failure of which requires a new trial. In *Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186 (10th Cir. 1997), the Tenth Circuit found that the district court had abused its discretion when it ordered judgment on an ambiguous verdict, rather than demanding clarification, thus necessitating a new trial. *Id.* at 1193. Therefore, in direct opposition to the Ninth Circuit rule, a court in the Tenth Circuit has no discretion to allow an inconsistent verdict to stand at all.

The Eleventh Circuit, in *Arthur Pew Construction Company, Inc. v. Lipscomb*, 965 F.2d 1559 (11th Cir. 1992), gave passing attention to the issue of inconsistency in general verdicts. Noted the Court, "No authority is suggested to us that requires that general verdicts be harmonious." *Id.* at 1571.

In conclusion, a review of the decisions above clearly indicates that a great deal of variation exists within the circuits concerning the proper remedy for inconsistent general verdicts. The decision below, in adding yet another remedy to the existent universe of possibilities, illustrates the abundant confusion regarding this issue. The rising tide of confusion calls out to this Court for an authoritative answer.

III. The court of appeals' decision contravenes Federal Rule of Civil Procedure 51 and conflicts with other circuit courts regarding waiver of objection to inconsistent verdicts.

A. The court of appeals' decision contravenes Federal Rule of Civil Procedure 51.

The court of appeals concluded that PHA had preserved its objection that the jury verdicts were inconsistent by

simply raising its objection for the first time in its post-trial motion. The Third Circuit's ruling is in direct conflict with Rule 51 and with the other circuit courts which have addressed this issue. Without clarification from this Court, the Third Circuit's ruling will create confusion for litigants and courts.

Federal Rule of Civil Procedure 51 requires a party to object to jury instructions prior to the jury retiring. Rule 51 of the Federal Rules of Civil Procedure states, in pertinent part, "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection . . . " Fed. R. Civ. P. 51.

PHA raised the argument of inconsistent verdicts for the first time in its post-trial motion when it argued that its liability was contingent upon a finding of liability of at least one of the individual defendants. By framing its argument as an attack on allegedly inconsistent verdicts, PHA sought to circumvent the requirements of Rule 51 of the Federal Rules of Civil Procedure.

PHA's claim was, in reality, an attack on the jury instructions defining the standard to be employed to determine its liability. Under the clear mandate of Rule 51, PHA waived this issue by failing to raise this claim until after the trial.

The district court instructed the jury that it could find against PHA even if the jury found that the individual defendants were not liable. App., *infra*, 10a-12a. This instruction precisely tracks the actual jury verdict in this case, the verdict that PHA now labels as objectionable. In other words, PHA's contentions rest on the premise that the law prohibited the jury from finding as instructed and that the jury instructions were, therefore, flawed.

The circuit courts which have addressed this issue have consistently ruled that when inconsistent verdicts can be traced to jury instructions and jury verdict sheets, a party's objection thereto must conform to Rule 51. If an instruction is incorrect in defining the standard to be

employed to determine a party's liability, the aggrieved party must "draw the court's attention to the error" to "flag" the issue or the claim of error is waived under Rule 51. *Gordon v. Degelmann*, 29 F.3d 295, 298 (7th Cir. 1994). "To excuse [a party] from the well-established rules of waiver would permit precisely the sort of 'sandbagging' that the rules are designed to prevent, while undermining the ideal of judicial economy that the rules are meant to serve." *Jarvis v. Ford Motor Company*, 283 F.3d 33, 62 (2nd Cir. 2002), *cert. denied*, 537 U.S. 1019 (2002).

The First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits are in accord regarding this issue. *See Ward v. Hickey*, 996 F.2d 448, 454-455 (1st Cir. 1993) (plaintiff did not request that jury decide a liability element and could not appeal for new trial based upon jury's failure to make that determination); *Lavoie v. Pacific Press & Sheer Company*, 975 F.2d 48, 56, 57 (2d Cir. 1992); *Barrett v. Orange County Human Relations Commission*, 194 F.3d 341, 349 (2d Cir. 1999); *Trull v. Volkswagen of America, Inc.*, 320 F.3d 1, 5-6 (1st Cir. 2003) (failure to object to jury instructions as required by Rule 51 deprives the non-objecting party to review except under the plain error doctrine) (citations omitted); *Haywood v. Ball*, 586 F.2d 996, 999-1000 (4th Cir. 1978); *Williams v. Thomas*, 692 F.2d 1032, 1035 (5th Cir. 1982), *cert. denied*, 462 U.S. 1133 (1983); *Preferred RX, Inc. v. American Prescription Plan, Inc.*, 46 F.3d 535, 548 (6th Cir. 1995); (citation omitted); *Chestnut v. Hall*, 284 F.3d 816, 819-820 (7th Cir. 2002); *Horstmyer v. Black & Decker, (U.S.), Inc.*, 151 F.3d 765, 771 (8th Cir. 1998) (citations omitted); *Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707 (9th Cir. 2001) (under Rule 51 failure to object to jury charge waives all objections, including plain error) (citations omitted); *Zhang*, 339 F.3d at 1030-1034 (citations omitted); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1176 (10th Cir. 1981), *cert. denied*, 464 U.S. 824 (1983).

The district court instructed the jury that each defendant and each petitioner's claims were to be considered separately. App., *infra*, 10a-11a. The district court also

instructed the jury that the liability of PHA could be based on "any act of an officer or employee of the Philadelphia Housing Authority, when acting within the scope of his or her employment." App., *infra,* 12a. The district court then submitted to the jury a verdict sheet with separate general verdicts to be determined for each petitioner as to each defendant. App., *infra*, 15a-17a.

PHA never argued or voiced ***any*** concern to the effect that PHA's liability was dependent upon the liability of the individual defendants. To the contrary, defendants understood that the liability of each defendant was to be determined independently.

PHA could have raised an objection to the jury charge and/or the jury verdict sheet at several points and failed to do so. PHA could have submitted proposed jury instructions and/or a proposed verdict sheet tying PHA's liability to that of the individual defendants. PHA could have raised this issue at the charging conference. PHA could have raised this issue during or after the reading of the jury instructions. PHA could have raised this issue when the verdict sheets were submitted to the jury.

Despite many opportunities to object, PHA did not voice any objection to the instructions setting forth the standard to be applied to determine PHA's liability or to the general verdict sheet.

Pursuant to the requirements of Rule 51, PHA has clearly waived this argument by failing to bring the issue to the district court's attention prior to the jury retiring. By resurrecting this waived claim, the court of appeals improperly deprived petitioners of their jury verdicts.

B. The court of appeals' decision regarding waiver of objection to inconsistent general verdicts is in conflict with the decisions of other circuit courts which have addressed this issue.

Even assuming, *arguendo*, that PHA has not waived its objection to inconsistent verdicts under Rule 51, PHA

has waived the issue by failing to raise the issue before the jury was discharged.

If PHA's objection had been raised before the jury was discharged, the district court could have instructed the jury to correct any potential inconsistency. By waiting until post-trial motions to raise this issue, PHA prevented the district court from doing so. The Third Circuit's decision sanctions such sandbagging and creates a conflict among the circuits.

The circuit courts that have addressed the issue have held that failure to object to inconsistent general jury verdicts[26] prior to the discharge of the jury waives the issue.

The First Circuit has consistently held that failure to object prior to the discharge of the jury means that the party waives its right to object to "any foreseeable combination of proper responses posed on the verdict forms." *Trull*, 320 F.3d at 4-5; *Howard v. Antilla*, 294 F.3d 244, 250 (1st Cir. 2002) (citations omitted); *Merchant*, 740 F.2d at 89 (citations omitted).

The Eighth, Tenth and Eleventh Circuits are in accord with the First Circuit that failure to object to inconsistent general verdicts prior to the discharge of the jury waives

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[26] Where, as here "a jury is instructed to apply legal principles and assign liability, the answers to the questions submitted to the jury" are general verdicts. *Jarvis*, 283 F.3d at 56; *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1274-1275 (11th Cir. 2002); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545-1546 (10th Cir. 1993).

Indeed, PHA acknowledged that the verdicts against PHA were general verdicts in its brief in support of its post-trial motion:

> Because the jury rendered ***general verdicts*** in the present case, rather than answering special interrogatories, the instant motion for a new trial is not governed by Fed. R. Civ. P. 49. . . . The ***general verdicts*** in this case are not accompanied by answers to written interrogatories concerning the factual determinations upon which they rest . . .

Memorandum of Law in support of PHA's post-trial motion at 32, n. 2. (A. 255).

the issue. *Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) (citing *Lockard v. Missouri Pacific R. Co.*, 894 F.2d 299, 304 (8th Cir. 1990), *cert. denied*, 498 U.S. 847 (1990)); *Oja v. Howmedica, Inc.*, 111 F.3d 782, 790 (10th Cir. 1997); *Hinds v. General Motors Corp.*, 988 F.2d 1039, 1047 (10th Cir. 1993) (citation omitted); *Resolution Trust Corp. v. Stone*, 998 F.2d 1534, 1545 (10th Cir. 1993) (citation omitted); *Mason v. Ford Motor Co.*, 307 F.3d 1271, 1275-1276 (11th Cir. 2002).

Although the Ninth Circuit has not issued a holding on this issue, it has suggested in dicta that it would find waiver for failure to object to inconsistent general verdicts prior to the discharge of the jury. *Pierce v. Southern Pacific Transportation Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987).

Principles of judicial economy and fair play compel the conclusion that PHA has waived this claim. Judicial economy requires that any party wishing to challenge an inconsistent verdict point the problem out to the trial court and ask for the jury to correct the inconsistency before it is discharged. This avoids the expense and additional time of a new trial and affords the jury, as the fact finder, the opportunity to clarify any inconsistency. To allow PHA to simply wait until long after the jury has been discharged before making its objection "would countenance agreeable acquiescence to perceivable error as a weapon of appellate advocacy." *McIsaac v. Didriksen Fishing Corp.*, 809 F.2d 129, 134 (1st Cir. 1987) (internal quotation omitted).

A party must not be allowed to intentionally fail to bring the issue of inconsistent verdicts to the trial court's attention prior to the discharge of the jury because it hopes that the inconsistency of the verdicts will afford them a new trial. Likewise, counsel representing both individual defendants and a municipal or corporate defendant must not be allowed to deliberately fail to bring the issue of inconsistent verdicts to the trial court's attention because of a fear that renewed deliberations by the jury would risk a jury finding in favor of a plaintiff and against one or more of the individual defendants.

The potential for abuse in this situation and considerations of judicial economy counsel that this Court rule that PHA has waived its inconsistent verdicts argument. Otherwise PHA will be rewarded for its tactical decision to seek a second trial rather than avoid affording the jury an opportunity to cure the alleged inconsistency.

The Third Circuit's ruling is in sharp conflict with other circuit courts which have considered the issue and the ruling has far-reaching consequences for litigants in federal courts. This ruling would allow parties to circumvent the requirements of Rule 51 by acquiescing to the standard of liability to be applied against it during trial, then, following an adverse determination, claiming that additional elements of liability were necessary. This is precisely the type of assault on judicial economy that Rule 51 is meant to prevent. Review by this Court is essential to clarify this important issue.

CONCLUSION

Pursuant to the arguments set forth above, petitioners respectfully request that this Honorable Court grant this petition for writ of certiorari. Petitioners further request that this Court set the case for further briefing and oral argument or, in the alternative, summarily reverse the judgment of the court of appeals and reinstate the jury's verdicts in favor of petitioners.

Respectfully submitted,

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Dated: September 22, 2003

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1822

GERALD PALADINO; JAMES WRIGHT

v.

PHILADELPHIA HOUSING AUTHORITY; FREDERICK S. PURNELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE FIELDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; CHARMAINE MORTON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; EDWARD A. FRANCE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JANE DOE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY;

Philadelphia Housing Authority,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA D.C.
Civil No. 99-cv-06424
District Judge: The Honorable Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a) March 4, 2003

Before: ROTH, BARRY, and FUENTES, *Circuit Judges*

(Opinion Filed: March 26, 2003)

OPINION

BARRY, *Circuit Judge*

Appellees Gerald Paladino and James Wright filed this reverse-race discrimination lawsuit against the Philadelphia Housing Authority ("PHA"), appellant herein, and four individual defendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 & 1983, and the Pennsylvania Human Relations Act, 43 PA. CONS. STAT. ANN. § 951-962. Appellees' §§ 1981 and 1983 claims against the PHA were dismissed on summary judgment, and one individual defendant, George Fields, was dismissed before the jury deliberated. The jury found for appellees as to their claims against the PHA, and against appellees as to their claims against the three remaining individual defendants, Frederick Purnell, Edward France, and Charmaine Morton. The District Court denied the PHA's renewed motion for judgment as a matter of law or, in the alternative, for a new trial. The Court granted in part and denied in part appellees' motions for attorneys' fees and entered a second amended judgment in the amount of $160,690 in favor of Paladino and $152,690 in favor of Wright. The PHA appealed. This Court has jurisdiction under 28 U.S.C. § 1291, and we will reverse.

Because the parties are familiar with the facts of the underlying dispute, we will discuss them only as necessary to resolve the issues presented.

We exercise plenary review over an order denying a motion for judgment as a matter of law. *Gagliardo v. Connaught Labs., Inc.*, 311 F.2d 565, 568 (3d Cir. 2002). We generally review the decision whether to grant a new trial for an abuse of discretion, but we give plenary review to pure questions of law. *Foster v. Nat'l Fuel Gas Co.*, 316 F.3d 424, 429-30 (3d Cir. 2003).

The heart of the PHA's appeal is its contention that the jury's verdict is fatally inconsistent. The jury found that the PHA unlawfully discriminated against appellees in violation of Title VII and the PHRA, but it also found that France, Morton, and Purnell were not liable as aiders and abettors under the PHRA and not liable under §§ 1981 and 1983. Appellees did not appeal the latter finding and, appellees' suggestion to the contrary, the PHA did not waive the inconsistent verdict issue. *See, e.g.*, A204, A209-12.

The District Court correctly instructed the jury that it could find that the defendants violated Title VII or § 1981 only if appellees' race "played a role and was a determinative factor in the defendants' decision-making and/or conduct which resulted in the denial of [the] promotion." The jury was also correctly instructed that individual defendant liability for aiding and abetting required "sharing of wrongful intent" with the PHA, and that the PHA can make decisions and act only through its agents.

A finding of intentional discrimination requires a finding that at least one person acting as the PHA's agent had a discriminatory animus towards appellees. Even if the jury drew the inference that the PHA willfully withheld incriminating documents, for example, it would have had to infer that a *particular* agent of PHA was responsible for the discrimination alleged against appellees. Since the bulk of appellees' evidence pointed to France or Morton, who were found to be not liable, the jury could not have found that sufficient evidence existed that Neil Wortman, who worked with France to develop the second selection process and ultimately made the decision to promote Fields, or any other minor actor in this drama, discriminated against appellees. If the jury concluded, as

it did, that none of the three individual defendants had a wrongful intent, and no other PHA agent could plausibly be at fault, then the PHA cannot be liable.

In *City of Los Angeles v. Heller*, 475 U.S. 796 (U.S. 1986), the Supreme Court upheld a district court's order dismissing all charges against a city and its police department based on the jury's verdict exonerating the individual police officer from liability under 42 U.S.C. § 1983 for an unlawful arrest and the use of excessive force. The court reasoned that the city and the police department were sued only because they were thought legally responsible for the officer's actions; "if the latter inflicted no constitutional injury on respondent, it is inconceivable that petitioners could be liable." *Id.* at 799. So, too, here.

The jury was correctly instructed on the law, and its verdict finding that France, Morton, and Purnell did not discriminate against appellees and did not aid and abet the PHA in discriminating against appellees is entirely reasonable in light of the weakness of the evidence against them. Moreover, its verdict regarding the individual defendants fatally undercuts the verdict finding the PHA liable. Therefore, the District Court erred in denying the PHA's post-trial motion for judgment as a matter of law or, in the alternative, for a new trial. Because the inconsistency of the jury's verdict requires us to reverse, we do not need to reach the manifold other issues raised by the PHA.

For the foregoing reasons, we will reverse and remand with instructions to enter judgment as a matter of law in favor of the PHA.

TO THE CLERK OF COURT:

Kindly file the foregoing opinion.

/s/ Maryanne Trump Barry
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1822

GERALD PALADINO; JAMES WRIGHT

v.

PHILADELPHIA HOUSING AUTHORITY;
FREDERICK S. PURNELL, INDIVIDUALLY AND
IN HIS OFFICIAL CAPACITY; GEORGE FIELDS,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
CHARMAINE MORTON, INDIVIDUALLY AND IN HER
OFFICIAL CAPACITY; EDWARD A. FRANCE, JR.,
INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY;
JOHN DOE, INDIVIDUALLY AND IN HIS OFFICIAL
CAPACITY; JANE DOE, INDIVIDUALLY AND IN
HER OFFICIAL CAPACITY;

Philadelphia Housing Authority,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 99-cv-06424
District Judge: The Honorable Eduardo C. Robreno

Submitted Under Third Circuit LAR 34.1(a)
March 4, 2003

Before: ROTH, BARRY, and FUENTES, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on March 4, 2003.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment be and hereby is reversed and remanded with instructions to enter judgment as a matter of law in favor of the PHA.

All of the above in accordance with the Opinion of this Court. Costs taxed against appellees.

ATTEST:

/s/ Marcie M. Waldron
Clerk

Dated: March 26, 2003

Costs taxed in favor of Appellant as follows:

Brief	$148.60
Appendix	$733.04
Reply Brief	$118.00
Docketing fee	$100.00
Sales Tax	$61.71
TOTAL	$1161.35

Certified as a true copy and issued in lieu of a formal mandate on May 5, 2003

Teste: /s/ Marcie M. Waldron
Clerk, U.S. Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PALADINO, et al. Plaintiffs, v. PHILADELPHIA HOUSING AUTHORITY, et al. Defendants.	:	CIVIL ACTION NO. 94-6424

ORDER

(Filed Feb. 27, 2002)

AND NOW, this **25th** day of **February, 2002**, following a hearing held on February 22, 2002 in which counsel for the parties participated, it is hereby **ORDERED** that:

1) Defendant PHA's Motion for Judgment as a Matter of Law (doc. no. 69-1) and for a New Trial on Plaintiffs' Claims of Discrimination (doc. no. 69-2) is **DENIED**; and

2) Plaintiffs' Motion for a New Trial against Individual Defendants Frederick S. Purnell, Charmaine Morton and Edward A. France, Jr. (doc. no. 65) is **DENIED**.

AND IT IS SO ORDERED.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD PALADINO, ET AL.	:	CIVIL ACTION
v.	:	
PHILADELPHIA HOUSING AUTHORITY, ET AL.	:	NO. 94-6424

CIVIL JUDGMENT

(Filed Jun. 13, 2001)

Before the Honorable Eduardo C. Robreno

AND NOW, this 12th day of June, 2001, in accordance with the Jury Verdict on June 11, 2001,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of plaintiff Gerald Paladino and against Philadelphia Housing Authority in the amount of $160,690.00 (ONE HUNDRED SIXTY THOUSAND AND SIX HUNDRED AND NINETY DOLLARS), in favor of James Wright and against Philadelphia Housing authority in the amount of $152,027.00 (ONE HUNDRED FIFTY-TWO THOUSAND AND TWENTY-SEVEN DOLLARS), and in favor of the individual defendants Frederick S. Purnell, Edward A. France, Jr. and Charmaine Morton and against the plaintiffs Gerald Paladino and James Wright.

BY THE COURT

ATTEST: /s/ Constantine S. Flores
Constantine S. Flores
Deputy Clerk

Faxed to: J. Gruenstein, Esq. P. Harvey, Esq.
N. Wasser, Esq. J. McLaughlin, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PALADINO, et al, Plaintiffs	:	CIVIL ACTION NO. 99-6424
v.	:	Philadelphia, Pennsylvania
PHILADELPHIA HOUSING AUTHORITY, et al, Defendants	:	June 8, 2001 10:00 o'clock a.m.

JURY TRIAL
BEFORE THE HONORABLE EDUARDO C. ROBRENO
UNITED STATES DISTRICT COURT JUDGE

* * *

Charge of the Court

[134] Now, in this case there are two plaintiffs to this action. And although they're two, it does not follow from that fact alone that if one plaintiff is entitled to recover, both would be entitled to recover.

There are, of course, three individual defendants and one corporate defendant. Each defendant is entitled to fair consideration as to each plaintiff. Just as each plaintiff is entitled to a fair consideration of that plaintiffs' claim against each defendant.

And, therefore, as you will see in the verdict sheet, the claims of each plaintiff must be tested under [135] these instructions as to each of the defendants. Conversely, the defenses alleged by each of the defendants should be tested against each plaintiff.

So you are not to just simply group all of the plaintiffs and all of the defendants and reach a joint or common verdict, but you must determine, as to each plaintiff, whether each plaintiff has proven each essential element of the claim that he has made as to each one of the defendants.

And it is possible that some of the claims will be sustained and some would not be sustained. And it's [sic] is also possible that none of the claims will be sustained. And it's also possible that all of the claims will be sustained. So all three outcomes are permitted under these instructions.

Again, although there is more than one defendant in this case, it does not follow from that fact alone that if one defendant is liable to the plaintiffs, all defendants are liable. Each defendant, as each plaintiff, is entitled to a fair consideration of the evidence. Neither defendant is to be prejudiced – none of the defendants – is to prejudiced should you find against the other.

However, unless otherwise stated, all of the instructions that I give you in this case govern the case as to each defendant. Similarly all of the instructions that I give you govern the case as to each of the plaintiffs.

Now, we've heard about the Philadelphia Housing [136] Authority and let me just explain to you what that entity is. The Philadelphia Housing Authority is an agency of the Commonwealth of Pennsylvania. It may act only through natural persons, as its officers and employees. The Philadelphia Housing Authority is responsible for the acts or omissions of their officers and employees when those acts or omissions are done within the scope of the employee's employment.

Therefore, any act of an officer or employee of the Philadelphia Housing Authority, when acting within the scope of his or her employment with the Philadelphia Housing Authority is an act of the Philadelphia Housing Authority. In this case it is undisputed that all acts done by officers and employees of the Philadelphia Housing Authority were within the scope of their employment of the Philadelphia Housing Authority.

* * *

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-1822

GERALD PALADINO; JAMES WRIGHT

v.

PHILADELPHIA HOUSING AUTHORITY; FREDERICK S. PURNELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; GEORGE FIELDS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; CHARMAINE MORTON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; EDWARD A. FRANCE, JR., INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JANE DOE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY;

Philadelphia Housing Authority,
Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
D.C. Civil No. 99-cv-06424
District Judge: The Honorable Eduardo C. Robreno

Present: SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, and SMITH, *Circuit* Judges

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SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING *EN BANC*

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryann Trump Barry
Circuit Judge

Dated: APR 25, 2003

CLW/cc: Leigh A. Jerner, Esq.
Nancy D. Wassner [sic], Esq.
Jack L. Gruenstein, Esq.
Patrick J. Harvey, Esq.
John P. McLaughlin, Esq.
William K. Kennedy, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD PALADINO, et al.	: CIVIL ACTION
Plaintiffs,	: NO. 99-6424
e. [sic]	:
PHILADELPHIA HOUSING AUTHORITY, et al.	:
Defendants.	:

VERDICT SHEET

1. Did the Philadelphia Housing Authority unlawfully discriminate against Gerald Paladino in violation of Title VII and the Pennsylvania Human Relations Act?

   Yes ✓ No _____

2. Did the Philadelphia Housing Authority unlawfully discriminate against James Wright in violation of Title VII and the Pennsylvania Human Relations Act?

   Yes ✓ No _____

3. Did Edward A. France, Jr. aid and abet the Philadelphia Housing Authority in unlawfully discriminating against Gerald Paladino in violation of the Pennsylvania Human Relations Act?

   Yes _____ No ✓

4. Did Charmaine Morton aid and abet the Philadelphia Housing Authority in unlawfully discriminating against Gerald Paladino in violation of the Pennsylvania Human Relations Act?

   Yes _____ No ✓

5. Did Frederick S. Purnell aid and abet the Philadelphia Housing Authority in unlawfully discriminating against Gerald Paladino in violation of the Pennsylvania Human Relations Act?

Yes _____ No ✓

6. Did Edward A. France, Jr. aid and abet the Philadelphia Housing Authority in unlawfully discriminating against James Wright in violation of the Pennsylvania Human Rights Act?

Yes _____ No ✓

7. Did Charmaine Morton aid and abet the Philadelphia Housing Authority in unlawfully discriminating against James Wright in violation of the Pennsylvania Human Relations Act?

Yes _____ No ✓

8. Did Frederick S. Purnell aid and abet the Philadelphia Housing Authority in unlawfully discriminating against James Wright in violation of the Pennsylvania Human Relations Act?

Yes _____ No ✓

9. Did Edward A. France, Jr. violate Sections 1981 and 1983 with respect to Gerald Paladino?

Yes _____ No ✓

10. Did Charmaine Morton violate Sections 1981 and 1983 with respect to Gerald Paladino?

Yes _____ No ✓

11. Did Frederick S. Purnell violate Sections 1981 and 1983 with respect to Gerald Paladino?

Yes _____ No ✓

12. Did Edward A. France, Jr. violate Sections 1981 and 1983 with respect to James Wright?

    Yes _____ No ✓

13. Did Charmaine Morton violate Sections 1981 and 1983 with respect to James Wright?

    Yes _____ No ✓

14. Did Frederick S. Purnell violate Sections 1981 and 1983 with respect to James Wright?

    Yes _____ No ✓

15. If you answered "Yes" to Questions # 1, 3-5, and 9-11, what amount of damages, if any, do you award Gerald Paladino?

    Front Pay: $ 129,000

    Back Pay: $ 11,690

    Compensatory: $ 20,000

16. If you answered "Yes" to Questions #2, 6-8, 12-14, what amount of damages, if any, do you award James Wright?

    Front Pay: $ 139,000

    Back Pay: $ 13,027

    Compensatory: $ 0

17. If you answered "Yes" to Question 9, what amount of punitive damages, if any, do you award Gerald Paladino?

    $ 0

18. If you answered "Yes" to Question 10, what amount of punitive damages, if any, do you award Gerald Paladino?

    $ 0

19. If you answered "Yes" to Question 11, what amount of punitive damages, if any, do you award Gerald Paladino?

    $ 0

20. If you answered "Yes" to Question 12, what amount of punitive damages, if any, do you award James Wright?

    $ 0

21. If you answered "Yes" to Question 13, what amount of punitive damages, if any, do you award James Wright?

    $ 0

22. If you answered "Yes" to Question 14, what amount of punitive damages, if any, do you award James Wright?

    $ 0

FOREPERSON: /s/ [Illegible]

DATE: 6-11-0